Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Petition of CRC Communications of Maine	)	**WC Docket No. 10-143**
and Time Warner Cable, Inc.	)	
for Preemption Pursuant to Section 253	)	
of the Communications Act, as Amended	)	

September 13, 2010

REPLY COMMENTS OF THE TELEPHONE ASSOCIATION OF MAINE

The Telephone Association of Maine (TAM) offers the following reply comments in the above captioned proceeding.[1]

Duty to Negotiate

Many of the initial round commenters call for the Commission to promote competition. What they are actually requesting is selective regulation providing a competitive advantage to non-RLEC providers. Despite what is claimed to be the purely competitive focus of the Telecommunications Act of 1996 ("TelAct"), Congress created special and unique obligations on telecommunications carriers to negotiate interconnection agreements in certain circumstances pursuant to Section 252. Looking at the actual language of the TelAct as adopted by Congress, claims of competition as the one and only overriding goal of the TelAct are clearly false. The VON Coalition stated that:

[1] TAM's members are Fairpoint Communications of Northern New England, Northland Telephone Company, China Telephone Company, Maine Telephone Company, Standish Telephone Company, Sidney Telephone Company, Cobboseecontee Telephone Company, Community Service Telephone Company, Hampden Telephone Company, Hartland & St. Albans Telephone Company, Somerset Telephone Company, The Islands Telephone Company, Warren Telephone Company, Oxford Telephone Company, Oxford West Telephone Company, Unitel, Mid-Maine Telcom, Saco River Telegraph & Telephone Company, The Pine Tree Telephone & Telegraph Company, Lincolnville Networks and Tidewater Telecom. These Comments reflect the position of the Association as a whole. Individual members of TAM may hold different positions than those set forth in these Comments and as such reserve the right to file additional comments or positions as they may deem appropriate. These Comments should be attributed to TAM as a whole and not to any individual company or companies.

> "However, five RLECs refused to interconnect, and CRC asked the Maine PUC to arbitrate the dispute, pursuant to Section 252 of the Act. Id. Following years of proceedings, the Maine PUC incorrectly interpreted Section 251 of the Act when it found that Section 251(f) insulates these five RLECs from the interconnection requirements of Sections 251(a) and (b). The plain words of the Act, however, suggest that the limited protection to be afforded to certain rural local exchange carriers is only from the provisions of Section 251(c), which imposes additional obligation on incumbent local exchange carriers, and does not shield rural LECs from the basic interconnection and reciprocal compensation requirements of Sections 251(a) and (b)."

VON Comments, at pp 1-2. The complaint as articulated is that the Maine Commission did not require compliance with Section 252. Unfortunately for the internal consistency of the VON Coalition's arguments, the obligation to negotiate under Section 252 of the TelAct happens to be one of the "additional obligation [*sic*] on incumbent local exchange carriers". The only language in the TelAct requiring negotiation pursuant to Section 252 appears in Section 251(c)(1), the very section of law that the VON Coalition agrees was designed by Congress as a "protection to be afforded to certain rural local exchange carriers".[2]

Similarly, Verizon, in their Comments, indicate that:

> "Contrary to the Maine Commission's conclusion, the availability of the arbitration process does not turn on whether a rural ILEC retains its temporary exemption from section 251(c), which applies only until a rural ILEC receives a request for interconnection, services, or network elements and a state commission determines that the request is not unduly burdensome. That temporary exemption, found in section 251(f)(1)(A), does not exempt rural ILECs from the arbitration process with respect to the 251(b) duties; it does not even mention the arbitration process described in section 252, nor does it say anything about the 251(b) duties."

Verizon Comments, at 2. Verizon is correct in one thing in that section, and that is the fact that 251(f) does not mention Section 252. Nor does Section 251(a), or Section 251(b). As noted above, it is ***only*** in section 251(c) that any duty to negotiate is established. Indeed, it is telling that Congress included Section 251(c)(1) entitled "Duty to Negotiate". It is a well established canon of statutory interpretation that all portions of

[2] Indeed, beyond Section 251(c) the only other references to Section 252 occur in Section 271, a portion of the TelAct that specifically applies to Regional Bell Operating Companies only.

a statute must be given meaning.[3] If there was a pre-existing implied Duty to Negotiate in Sections 251(a) and (b), then Section 251(c)(1) would be superfluous. Since Congress did, in fact, create a separate and distinct obligation for negotiation pursuant to Section 251(c) that section of law must be given meaning and not rendered superfluous. The plain reading of the statute makes it conclusive that Congress intended that the Duty to Negotiate pursuant to Section 252 is an additional obligation of incumbent local exchange carriers pursuant to Section 251(c) that does not apply to non-incumbent telecommunications carriers or to those ILECs subject to the Rural Exemption in Section 251(f).

Reliance on Time Warner Declaratory Ruling is Misplaced

Verizon, in their comments, goes through a lengthy discussion of the Time Warner Declaratory Ruling[4] expounding on everything about the case with the minor exception of the actual legal holding of the case and the express limitations the FCC placed on the scope of that holding. Paragraph 8 of the Time Warner Declaratory Ruling states:

> "Because the Act does not differentiate between retail and wholesale services when defining "telecommunications carrier" or "telecommunications service," we clarify that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services."

Paragraph 8 also includes footnote 18, which indicates that:

> "Because neither of the primary state commission proceedings underlying the Petition relied on or even interpreted section 251(c)

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[3] *See United States v. Morton*, 467 U.S. 822, 828 (1984); *See also* 2A N. Singer Sutherland on Statutory Construction § 46.06, p. 104 (C. Sands 4th rev. ed. 1984) ("A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant") (footnotes omitted) Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991); *See also* Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003) (interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation"). *See also* Bailey v. United States, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense).

[4] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) ("Time Warner Declaratory Ruling")

> of the Act, we do not read the Petition to seek clarification on the ability to interconnect pursuant to that provision."

The only precedential effect that the Time Warner Declaratory Ruling has is with regard to the question of whether wholesalers are entitled to interconnection in non-Section 251(c) situations. Indeed, the Time Warner Declaratory Ruling itself notes that:

> "Certain commenters ask us to reach other issues, including the application of section 251(b)(5) and the classification of VoIP services. ***We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically*** that the Commission is currently addressing elsewhere on more comprehensive records." (emphasis added)

Time Warner Declaratory Ruling, at ¶ 17. Accordingly, Verizon's reliance on the Time Warner Declaratory Ruling as any statement on Section 251(a) or (b) obligations beyond whether they apply to wholesalers in a non-Section 251(c) situation has been explicitly rebuffed by the language of the Declaratory Ruling itself. Verizon's insinuation that the dicta in the Time Warner Declaratory Ruling should, or even legally speaking could, be read in such a way as to override the language as adopted by Congress that placed the duty to negotiate under Section 252 in one place and one place only, Section 251(c), is clearly baseless.

Rural Exemption Proceedings are not absolute bars to competition.

A common thread throughout the comments by Time Warner's supporters is the idea that by initiating rural exemption proceedings the Maine Public Utilities Commission erected an absolute bar to Time Warner's ability to enter into the rural exchanges in question. This argument is obviously necessary for them to make, because if a rural exemption proceeding was not an absolute bar to competition, then Time Warner's entire request falls apart at the seams given that Section 253(a) only applies when a State is applying a law, rule or order in a manner than *prohibits* the offering of telecommunications service. Conversely, if the application of Section 251(f) of the TelAct could in fact result in a provider having the ability to offer telecommunications services, then the MPUC's act was clearly not prohibitive and therefore outside the scope of Section 253(a). The clear reality, as noted by Time Warner, is that in numerous situations across the country, State commissions have in fact adjudicated rural exemption proceedings with the result that the rural exemptions for the targeted exchanges were in fact removed. In those situations, based on the specific facts in each proceeding, the State commissions have undertaken the Congressionally mandated task, weighed the empirical data at the local level as intended by Congress, and found that the threshold criteria related to ensuring no undue economic burden and preservation of the universal service principles were met and thus competition was allowed. Exactly as intended by Congress. Time Warner and its supporters seek to make the argument that this entire process can and should be bypassed, although interestingly the issue was raised with the

FCC only after the MPUC found that Time Warner did *not* meet the threshold criteria established by Congress. Moreover, Time Warner and its supporters argue that the FCC should overturn and preempt a State decision regardless of the actual empirical data, despite the fact that Congress explicitly and unequivocally placed the determinations at the State level to ensure that every specific case was addressed based on its own merits.

The plain language of the TelAct does not support the petition of Time Warner or the position of its supporters. Congress intended that Section 253 be used to prevent a State from frustrating the goals of Congress. Section 253 is ***not*** designed to allow entities who have failed to meet ***Congressionally mandated*** criteria for competitive entry into rural exchanges to have a second bite at the apple by reversing a decision that did nothing more than implement the language of the TelAct itself. Requiring compliance with the plain language of the TelAct is neither an act designed to frustrate the goals of Congress nor is it an action that prohibits telecommunications services from being offered. Time Warner lost on the facts. Time Warner's petition failed under the current circumstances in the specific exchanges in question not because of any State action but because its request was lacking in merit under the process established by Congress. Section 253 was not designed to mollify sore losers, and the FCC should not interpret it as such.

120 Day Proceeding

TAM feels compelled to comment on NCTH's proposal in their comments in the above captioned proceeding that the Commission:

> "declare that when a state PUC takes longer than 120 days to act on an exemption proceeding under Section 251(f), the Commission shall deem such delay to have the effect of prohibiting the ability of an entity to provide telecommunications service under Section 253(a), and in that case the State's authority to act shall be automatically preempted and the rural exemption shall be deemed terminated, unless the Commission provides otherwise."

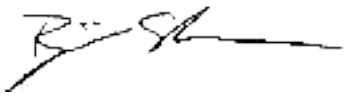
NTCH,Inc., Comments In Support of Preemption Petition Of CRC Communications of Maine, Inc. and Time Warner Cable Inc., at 5. Absent the fact that all parties to the proceeding agreed to a schedule that exceeded 120 days, and indeed the first proposal to exceed the 120 day period came from CRC Communications in their initial filing, NTCH's proposal is actually an inversion of the burden of proof as established in the TelAct. Under the TelAct it is the petitioner that has the burden to prove, within 120 days, that their petition would not create undue economic burdens or harm the principles of Universal Service. Accordingly, the logical application of the theory advanced by NTCH would be that the 120 day period must be met or else the Congressionally mandated protections would continue in force. The actions of the MPUC and all the parties in allowing CRC Communications and Time Warner longer than 120 days to attempt to meet its burdens of proof was a benefit to Time Warner, not the rural providers. What NTCH seeks is uninformed at best and at worst an express request that the Commission violate the law by arbitrarily shifting the Congressionally mandated

burdens of proof to strip away protections established to ensure that unfettered competition, which may be appropriate in densely populated regions of the country, not harm rural Americans in areas with their different circumstances and needs.

Conclusion

For the reasons set forth above, TAM would respectfully urge the Commission to focus on implementing the policies established by Congress, including the recognition by Congress that, while competition is one of the goals of the TelAct, it must be balanced against additional factors in rural parts of the country. Time Warner has gone through the process in Maine, and it has been shown through the evidence on the record in the Maine proceedings that Time Warner's request would do harm to rural customers in Maine and the Universal Service principles established by Congress. Time Warner's request lacks any merit and is simply an attempt to bypass the Congressionally established framework to the direct harm of rural Americans. The Commission should follow the lead of Congress and ensure that any decision is in the best interest of ***all*** Americans and not allow Time Warner to subvert the Congressional procedures and protections established for rural Americans.

Respectfully Submitted,



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